Filed 8/16/10 In re Brianna B. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Briana B., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B220507 (Super. Ct. No. 2009012964) (Ventura County)
THE PEOPLE, Plaintiff and Respondent, v. BRIANA B., Defendant and Appellant.	

Briana B. appeals from a juvenile court order sustaining a Welfare and Institutions Code section 602 petition for two counts of petty theft. (Pen. Code, § 484, subd. (a).)[1] The trial court declared appellant a ward of the court and granted probation. Appellant contends that the evidence does not support count 2 of the petition, theft of a cell phone. We affirm.

Facts & Procedural History

On May 19, 2009 a petition was filed alleging two counts of petty theft. (§ 484, subd. (a).) On count 1, appellant admitted that she and Madison G. stole a bottle

[1] All statutory references are to the Penal Code.

of liquor from Longs Drug Store. (Pen. Code, § 484, subd. (a).) With respect to count 2 for theft of a cell phone, the evidence was received as follows:

On November 25, 2008, 15 year old Lyndsey A. left her cell phone in the gym restroom before a basketball game at Newbury Park High School. After the game, Lyndsey and her mother searched the restroom and checked the front office to see if the cell phone was turned in. The cell phone was never found. The phone contacts list listed Lyndsey's name, address, phone number and e-mail address as the owner of the phone. Lyndsey testified that one could identify the owner by just looking in the cell phone.

Lyndsey's mother checked the cell phone bill and determined that someone used the phone to call an unknown phone number three times between 5:10 and 5:15 p.m. on November 25, 2008. The information was forwarded to the Conejo Valley School District resource officer, Ventura County Sheriff Deputy Michael Purnell. Deputy Purnell determined that appellant was the person who made the phone calls and met with appellant and the school principal at Conejo Valley High School.

Appellant said that she knew why Deputy Purnell was there and admitted finding a cell phone at Newbury Park High School. Appellant said that she used the phone to make several calls to her boyfriend and put the phone back in the restroom. Deputy Purnell told appellant that the cell phone was still missing and that she would not be arrested if she paid for it. Appellant said that she would pay for the phone.

Appellant's friend, Madison G., stated that she and appellant went to the basketball game and that appellant found the cell phone in the restroom. Appellant looked in the phone contacts list for the owner and took the cell phone out to the soccer field and called her boyfriend. Maddie said that appellant "called my phone and it was – I think it was a (619) area code, which isn't our area code." After they returned to the basketball game, appellant "put the phone back, and we left."

Appellant's testimony was essentially the same. Appellant found the cell phone, took it to the soccer field, and tried to identify the owner by looking in the phone contacts list. Appellant said that she called her boyfriend and Maddie, and put the cell phone back in the restroom.

Sufficiency of the Evidence

Theft by larceny requires the taking of another's property, with the intent to steal and carry it away. (*People v. Gomez* (2008) 43 Cal.4th 249, 254-255.) "The elements of theft by larceny are (1) the defendant took possession of person property owned by someone else; (2) the defendant did so without the owner's consent; (3) when the defendant took the property, he or she intended to deprive the owner of it permanently; and (4) the defendant moved the property, even a small distance, and kept it for any period of time, however brief. [Citations.]" (*People v. Catley* (2007) 148 Cal.App.4th 500, 505.)

Appellant admitted that she found and took a cell phone that did not belong to her, that she took the phone to the soccer field, that she used the phone to call her boyfriend, and that she left the phone in the bathroom. The only disputed issue was intent to permanently deprive the owner of possession of the phone.

Intent is often proven by circumstantial evidence and may be inferred from all the facts and circumstances surrounding the crime. (See e.g., *People v. Lewis* (2001) 25 Cal.4th 610, 643.) Theft of lost property is covered in section 485 which provides: "One who finds lost property under circumstances which give him knowledge of or means of inquiry as to the true owner, and who appropriates such property to his own use. . . , without first making reasonable and just efforts to find the owner and to restore the property to him, is guilty of theft."

The trial court found that appellant "was under no obligation to find the owner of the phone. She was not required to pick up the phone. She decided to do so. . . . She . . . took it with her away from the gym . . . ."

Intent to steal may be inferred from what appellant did with the phone. Appellant took it to the soccer field and claimed that she called her boyfriend two times. The phone records, however, indicated that three calls were made to the same number. Appellant said that she also called Maddie but the phone call did not appear on the phone records.

The trial court found that appellant and Maddie "claimed that they returned [the phone] to the same location where they had found it. [¶] The Court certainly has great question about that because [appellant] maintains that she made phone calls and also made a phone call to this person Maddie. Why she would have made a phone call to this person Maddie who claims to have been with her all this time certainly does not -- has a great question as to what, in fact, happened with that phone."

Discrediting appellant's testimony, the trial court factually found that appellant took the cell phone with the intent to steal it. Rather than turn the phone over to school authorities, appellant took it to the soccer field and made several calls. Although appellant claims that she put the phone back in the restroom, restoration of property wrongfully taken is no defense to a charge of theft. (*People v. Pond* (1955) 44 Cal.2d 665, 674; (2 Witkin & Epstein, Cal. Criminal Law (3rd ed. 2000) Crimes Against Property § 25, p. 45.)

In a juvenile case, we "apply the same standard of review applicable to any claim by a criminal defendant challenging the sufficiency of the evidence to support a judgment of conviction on appeal. Under this standard, the critical inquiry is 'whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1371.) Before the judgment can be set aside for insufficiency of the evidence, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. (*Id*., at p. 1372.)

Substantial evidence supports the trial court's express factually finding that appellant took the cell phone with the intent to steal it. "[I]ntent to steal is satisfied when 'the defendant takes property with intent to use it temporarily and then to *abandon* it in circumstances making it unlikely the owner will recover it.'" (*People v. Avery* (2002) 27 Cal.4th 49, 57, citing *People v. Davis* (1998) 19 Cal.4th 301, 307, fn. 4.) The same principle applies to the theft of lost property which in this case was in the constructive

possession of its owner. (2 Witkin & Epstein, Cal. Criminal Law, Crimes Against Property, *supra*, § 23, p. 43.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Manuel J. Covarrubias, Judge

Superior Court County of Ventura

_____

Susan B. Gans-Smith, under appointment by the Court of Appeal, for Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, A. Scott Hayward, Deputy Attorney General, for Respondent.